No. 00-1614

IN THE

Supreme Court of the United States

NATIONAL RAILROAD PASSENGER CORPORATION,

Petitioner,

v.

ABNER MORGAN, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief For The Lawyers' Committee For Civil Rights Under Law; The National Association For The Advancement Of Colored People; The Minority Business Enterprise Legal Defense And Education Fund, Inc.; Now Legal Defense And Education Fund; The National Women's Law Center; The National Partnership For Women And Families; The American Jewish Congress; AARP; And The National Employment Lawyers Association As Amici Curiae In Support Of Respondent

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QUESTION PRESENTED

Whether a pattern of discriminatory acts or practices outside of Title VII's charge-filing period is actionable and provides a basis for recovery as a continuing violation, where one or more related acts occur within the charge-filing period.

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STATEMENT OF INTERESTS OF *AMICI CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law is a tax-exempt, nonprofit civil rights legal organization founded in 1963 by the leaders of the American bar at the request of President Kennedy, to provide legal representation to the victims of civil rights violations. Its members include former Attorneys General, former Assistant Attorneys General for the Civil Rights Division of the Justice Department, former Chairs of the Equal Employment Opportunity Commission, former Secretaries of Cabinet Departments, law school deans and professors, and many of the nation's leading lawyers. Over the last 38 years, the Lawyers' Committee and its local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington have represented members of minority groups and women in hundreds of civil rights cases.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. It has state and local affiliates throughout the nation. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social and economic status of minority groups; the elimination of racial prejudice; the publicizing of adverse effects of racial discrimination; and the initiation of lawful action to secure the elimination of racial bias. The NAACP has appeared before courts throughout the nation in numerous civil rights cases concerning employees' rights to bring claims of employment discrimination.

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1. By letter to the Court dated July 26, 2001, the parties consented to the filing of *amicus curiae* briefs by any third party in support of either party. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* made any monetary contribution to the preparation or submission of this brief.

The Minority Business Enterprise Legal Defense and Education Fund, Inc. ("MBELDEF") is a nonprofit corporation founded in 1980 by former Maryland Congressman Parren J. Mitchell. The primary purpose of MBELDEF is to promote legally defensible minority business opportunity programs that ensure the fair and equitable participation of minority businesses in the marketplace. As part of its mission, MBELDEF also pursues litigation on behalf of minority business enterprises to attack discriminatory barriers and practices in the marketplace where the issues are part and parcel to the attainment of economic parity and full integration of the marketplace. Many of the lawsuits brought by MBELDEF seek to address "continuing violations" in the making or enforcement of contracts under 42 U.S.C. § 1981. Accordingly, MBELDEF has a strong interest in ensuring that our ability to address such violations through legal recourse is not diminished.

NOW Legal Defense and Education Fund ("NOW Legal Defense") is a leading national non-profit civil rights organization that uses the power of the law to define and defend women's rights. A major goal of NOW Legal Defense is the elimination of barriers that deny women economic opportunities, such as employment discrimination. In furtherance of that goal, NOW Legal Defense litigates cases to secure full enforcement of laws prohibiting employment discrimination, and has participated as an *amicus curiae* in many cases before this Court.

The National Women's Law Center (NWLC) is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination form all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in the workplace, including through the full enforcement of Title VII of the Civil Rights Act of

1964 as amended. NWLC has filed numerous *amicus curiae* briefs on employment law and civil rights issues.

The National Partnership for Women & Families, a non-profit, national advocacy organization founded in 1971 as the Women's Legal Defense Fund, promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious workplace discrimination and has filed numerous briefs *amicus curiae* in this Court and in the federal circuit courts of appeals to advance the opportunities of women and minorities in employment.

The American Jewish Congress is an organization of American Jews committed to the protection of the civil, economic, political and religious rights of American Jews and all Americans. It was founded in 1918 and since that time has continually urged full equality in employment.

AARP is a nonprofit membership organization serving more than thirty-five million persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. One of AARP's primary objectives is to strive to achieve dignity and equality in the workplace through positive attitudes, practices, and policies towards work and retirement. In pursuit of this objective, AARP has since 1985 filed more than 200 *amicus* briefs before this Court and the federal appellate and district courts.

The National Employment Lawyers Association (NELA) is a voluntary membership organization of more than 3,000 attorney members who regularly represent employees in labor, employment, and civil rights disputes. NELA is the country's only professional membership organization of

lawyers who represent employees in discrimination, wrongful discharge, employee benefit, and other employment-related matters. NELA has filed numerous *amicus curiae* briefs before this Court and the federal appellate and district courts regarding the proper interpretation and application of employment discrimination laws.

STATEMENT OF THE CASE

Amici curiae adopt the statement set out in Respondent's brief.

SUMMARY OF ARGUMENT

This case presents questions regarding the proper application of this Court's "continuing violation" doctrine in the context of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* ("Title VII" or "the Act"), and the Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1072-1074 (42 U.S.C. § 1981a). Specifically, the case involves whether discriminatory conduct outside the charge-filing period in § 706(e) of the Act, 42 U.S.C. § 2000e-5(e), can be the subject of suit and recovery, where such conduct is "part of a series or pattern of discrimination, retaliation, and hostile environment that started" prior to the charge-filing period, and where one or more related acts of discrimination occurred within the filing period. *Morgan v. National R.R. Pass. Corp.*, 232 F.3d 1008, 1017 (9th Cir. 2001).

Amici, in support of Respondent, urge the Court to reaffirm the established "continuing violation" doctrine by which Title VII liability reaches patterns of discriminatory acts or practices that began before, but continued into, the charge-filing period. Both the Petitioner and the United States as *amicus curiae* seek to have this Court eliminate that

doctrine, although they do not forthrightly ask the Court to do so, and although each attempts a different route to the same result. *Amici* urge the Court to reject these arguments.[2]

Petitioner incorrectly characterizes Title VII as recognizing only "discrete acts" of discrimination, and argues that the charge-filing period begins and ends separately for each "discrete act," such that no discrimination beyond 180 or 300 days is ever actionable. Accordingly, it proposes to substitute for the existing "continuing violation" doctrine a concept of "recurring violations." *Id.* at 21 n.7. Petitioner further suggests that the charge-filing period commences according to a "notice accrual" rule, by which a claim is extinguished within 180 or 300 days of an employee's notice of a discriminatory act, regardless of whether the pattern of discrimination continues thereafter. Petitioner would attach the label "continuing violation" only to conduct that alone is insufficient to constitute a violation, or could not be recognized by the employee to be discrimination. While Petitioner thus argues that damages for violations of the Act are limited by the 180- or 300-day charge-filing period, it does not attempt to reconcile its position with the Act's express provision authorizing back pay for up to two years prior to the filing of a charge. Moreover, Petitioner makes no mention of 42 U.S.C. § 1981a, by which Congress imposed limits on compensatory and punitive damage awards as it made them available under the Civil Rights Act of 1991.

The United States contradicts Petitioner by correctly pointing out that notice is irrelevant to the continuing

2. Because of textual similarities between Title VII and other employment discrimination laws, and because Congress looked to Title VII as a model in enacting such laws, the outcome of this case likely will extend well beyond the confines of Title VII. *See, e.g., Lorillard v. Pons*, 434 U.S. 575, 584 (1978) (prohibitions of the Age Discrimination in Employment Act derive *in haec verba* from Title VII).

violation doctrine, which looks instead to whether there is actionable conduct consistent with the pre-existing pattern within the charge-filing period. U.S. Br. at 11. But the United States ultimately, but not explicitly, suggests that the charge-filing period commences with notice — even notice before an act of discrimination occurs — and that the continuing violation doctrine does no more than excuse "prior notice" as to a violation *within* the charge-filing period. Thus, it argues that the continuing violation doctrine has no effect except that "a Title VII plaintiff may recover for discrimination that occurs within the charge-filing period despite having notice of a violation outside the period," but then tacks on the distinct assertion "but may not recover for violations that occurred outside the period." U.S. Br. at 17. The United States premises this latter assertion on antitrust law, hornbooks on nuisance and contract law, U.S. Br. at 11-13, and its argument that it is the charge-filing section of the Act, rather than the explicit statutory provisions governing back pay and damage awards, respectively, that limits recovery for a violation. U.S. Br. at 22-26.

Amici write to clarify that the question presented in this case is answered by two distinct inquiries: (1) when a violation under Title VII — particularly a continuing violation — accrues for purposes of § 706(e); and (2) whether the controlling limitations on recoveries for violations of the Act come not from the charge-filing provision of § 706(e), but from the explicit statutory limits on back pay in § 706(g)(1) and on damages in 42 U.S.C. § 1981a. These two inquiries are answered by established precedent and by the statute. First, violations accrue for purposes of § 706(e) when the discrimination "occurs," and a continuing violation — a pattern of conduct or practices that begins prior to, but continues into, the charge-filing period — "occurs" at the time of the last asserted act of the pattern. Second, Congress has provided separate, explicit limits on recoveries that do

not reference the charge-filing provision. At least one of these limits expressly provides for recoveries substantially beyond the charge-filing period. Accordingly, discriminatory conduct prior to and continuing into the charge-filing period is subject to Title VII and relief can be afforded for such violations consistent with the explicit limits on back pay and damages imposed by the statute.

ARGUMENT

I. A "CONTINUING VIOLATION" ACCRUES AT THE TIME OF THE LAST ASSERTED ACT IN THE PATTERN OF DISCRIMINATION.

A. The Continuing Violation Doctrine Postpones Accrual Until The Continuing Wrong Ceases.

Section 706(e) of Title VII provides that a charge of unlawful discrimination must be filed with the EEOC within a specified statutory period (here, 300 days) "after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). Referring to § 706(e), this Court has stated that "Congress has decided that time limitations periods commence with the date of the 'alleged unlawful employment practice.' " *Delaware State College v. Ricks*, 449 U.S. 250, 259 (1980). Thus, for purposes of § 706(e), this Court has consistently held that a discriminatory practice "occurs" at the time of the discriminatory acts alleged in the complaint. In *Ricks* this Court emphasized (quoting the Ninth Circuit) that "[t]he proper focus is upon the time of the *discriminatory acts*." *Id.* at 258 (*quoting Abramson v. University of Hawaii*, 594 F.2d 202, 209 (1979) (emphasis supplied)); *accord Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 906 (1989). Therefore, "[d]etermining the timeliness of [an] EEOC complaint, and [an] ensuing lawsuit requires [courts] to identify precisely the 'unlawful employment practice' of which [plaintiff] complains." *Ricks*, 449 U.S. at 257.

Where the discriminatory act actually complained of lies outside of the charge-filing period, it is not timely. *Id.* at 257-58 (complaint referred to discriminatory denial of tenure, not termination, thus untimely); *Lorance*, 490 U.S. at 906 (complaint as to diminution in employment status occurred in 1979, so 1983 EEOC complaint untimely); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 557 (1977) (1973 EEOC charge untimely as to practice that occurred in 1968).

Where the discrimination is not a single, isolated act, but a series of discriminatory acts that are so related as to be fairly regarded as a continuing "unlawful employment practice" or course of conduct, this Court has determined that the discriminatory act "occurs" at the time of the last act asserted to be a part of the pattern. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), so held in circumstances nearly identical to those in this case, in the context of the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* There, the question was whether alleged discriminatory acts that predated that Act's 180-day charge-filing period and that were part of a course of conduct continuing into the charge-filing period were actionable under the Fair Housing Act. At the time *Havens* was decided, § 812(a) of the Fair Housing Act, 42 U.S.C. § 3612(a), in language identical to that of Title VII, required that "[a] civil action shall be commenced *within one hundred and eighty days after the alleged discriminatory housing practice occurred*." *Id.* at 380 & n.22 (emphasis added). The plaintiffs in *Havens* alleged "five different specific incidents allegedly in violation of the Fair Housing Act," *id.* at 380, the first four of which were outside the 180-day statutory period. This Court found the complaint to have alleged a continuing violation, and unanimously held that:

> for purposes of [the charge-filing period], a "continuing violation" of the Fair Housing Act should be treated differently from one discrete act

> of discrimination. . . . [W]e therefore conclude that where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice.

Id. at 380-81. Accordingly, a related course of acts that fairly comprise a practice of discrimination is deemed to "occur," within the meaning of a limitations period, at the "last asserted occurrence" of that pattern of unlawful conduct. *Id.* at 381.

The petitioners in *Havens* argued — without persuading a single member of the Court — that the charge-filing period for each incident ran from the date of that incident. This Court rejected the "Petitioners' wooden application" of the limitations period because it "ignore[d] the continuing nature of the alleged violation" and "undermine[d] the broad remedial intent of Congress embodied in the Act." *Id.* at 380. Here, the Respondent and the United States offer only the same "wooden application" of the identical language of § 706(e) of Title VII. It, too, must be rejected.

Bazemore v. Friday, 478 U.S. 385 (1986), employed the same analysis with respect to discriminatory conduct that predated even Title VII's prohibition on discrimination by state and local government employers. There the Court held actionable a continuing series of unlawful acts that began before the statute's effective date made that conduct unlawful:

> A pattern that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon

> Title VII's effective date, and *to the extent an employer continued to engage in that act or practice, it is liable under that statute.*

Id. at 395. This Court looked to the continuing acts of the defendants that persisted to the time that proceedings were commenced in determining whether the pattern was actionable: "Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." *Id.* at 395-96 (Brennan, J., concurring, joined by all members of the Court).

In *Bazemore*, as in *Havens*, this Court rejected the view that pre-limitations discriminatory conduct could not be reached under the Act. Specifically, the Court rejected the suggestion that differences in salary at the commencement of proceedings were no more than the present effects of past discrimination that was not actionable, as in *United Air Lines v. Evans*, 431 U.S. at 558. *Bazemore* held the distinction to lie in the existence of timely acts of discrimination; in short, the discrimination had not ended before the action was commenced:

> The "critical question," the Court declared, "is whether any *present violation* exists." Because the employer was not engaged in discriminatory practices at the time the respondent in *Evans* brought suit, there simply was no violation of Title VII.

Bazemore, at 396 n.6, *quoting Evans* at 558. Accordingly, *Bazemore*, consistent with the rule in *Havens*, holds that current acts in furtherance of a preexisting pattern of discrimination make that pattern actionable under Title VII.

This Court's cases consistently have recognized that the "continuing violation" doctrine permits Title VII to reach

conduct prior to the charge-filing period where discriminatory acts continue into that period. For example, in *Ricks*, 449 U.S. at 257 (citation omitted), the Court observed:

> In effect, [Ricks] is claiming a "continuing violation" of the civil rights laws with the result that the limitations periods did not commence to run until his 1-year "terminal" contract expired. This argument cannot be squared with the allegations of the complaint. Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination. If Ricks intended to complain of a discriminatory discharge, he should have identified the *alleged discriminatory acts that continued until, or occurred at the time of*, the actual termination of his employment.

See also Lorance, 490 U.S. at 908 ("petitioners . . . have asserted a claim that is *wholly dependent* on discriminatory conduct occurring well outside the period of limitations, and cannot complain of a continuing violation") (emphasis added); *Evans*, 431 U.S. at 557-58 (claim of continuing violation rejected because "the critical question is whether any present violation exists").

At least two other courts of appeals have, like the Ninth Circuit, used this same analysis when a course of discrimination is not complete. Applying, inter alia, *Ricks, Lorance, Evans,* and *Bazemore*, the Third Circuit has repeatedly held, " '[i]f the alleged discriminatory conduct is a "continuing violation," the statute of limitations begins to run on the date of the last occurrence of discrimination, rather than the first.' " *Cardenas v. Massey*, No. 00-5225, 2001 WL 1230325 at *2 (Oct. 16, 2001) (quoting *Miller v. Beneficial Mgmt. Corp.*, 977 F.2d 834, 842 (3d Cir. 1992)). And the Second Circuit has held, "if a plaintiff has experienced a continuous practice and policy of

discrimination, the commencement of the statute of limitations period may be delayed until the last discriminatory act in furtherance of it." *Fitzgerald v. Henderson*, 251 F.3d 345, 359 (2d Cir. 2001). In such situations, like Mr. Morgan's, "a continuing violation may be found where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice." *Id.*

B. There Is No Foundation In Either Title VII Or In This Court's Cases for the Arguments Advanced By Petitioner And The United States.

Contrary to this Court's cases, Petitioner incorrectly criticizes the continuing violation doctrine, and the court of appeals, as "permitting recovery for *discrete acts* of alleged discrimination years after the expiration of the limitations period." Pet. Br. at 11. The continuing violation doctrine is not available where only discrete acts are alleged. Instead, only continuing, related acts that comprise a pattern of discrimination are considered continuing violations. And, notwithstanding Petitioners' fervent repetition of the words "discrete acts," the prohibitions of Title VII are directed to, and its charge-filing period is triggered by, "unlawful employment *practices*." Nothing in the language of § 706(e) or this Court's civil rights cases supports the proposition that the charge-filing period operates separately for each discrete act of a discriminatory "employment practice," or that violations of the Act that extend beyond the charge-filing period are not actionable. Pet. Br. at 19, 21. In short, Petitioner's imaginative conception of "recurring violations" as a substitute for the established continuing violation doctrine, Pet. Br. at 21 n.7, is wholly without a basis in Title VII.[3]

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3. Similarly, Petitioner's hypothesis that continuing violations should be reserved only for circumstances in which the conduct has

(Cont'd)

Likewise, Petitioner ignores both the clear language of § 706(e) and this Court's cases when it asserts that "this Court has rejected attempts to extend the limitations period when a discrete allegedly discriminatory act has put the plaintiff on notice of a potential claim." Pet. Br. at 15. This assertion is doubly wrong. The language of § 706(e) expressly provides, and this Court has consistently held, that the charge-filing period commences when the discriminatory act "occurs." And the cases to which Petitioner refers, Pet. Br. at 16-18, refused to apply the continuing violation doctrine not because the plaintiff was "on notice," but because the plaintiff could not (as in *Evans* and *Lorance*) or did not (as in *Ricks*) allege a current discriminatory act.

Further, Petitioner attempts to distinguish *Havens* in a single footnote and suggests, without any reference to *Bazemore*, that the law regarding the effect of limitations periods has developed differently with respect to Title VII and the Fair Housing Act. Pet. Br. at 30 n.8. This Court's holdings and analysis in *Havens*, *Bazemore*, *Evans*, *Ricks*, and *Lorance* all belie Petitioner's suggestion. As noted above, the operative limitations language of § 706(e) is identical to that of the Fair Housing Act in *Havens*, and all these decisions looked to whether there were current acts of discrimination in determining whether a preexisting pattern of such conduct had not ceased and was, therefore, actionable.

(Cont'd)

not yet risen to the level or quantum to constitute a violation, or where an employee could not yet reasonably understand that the conduct is discriminatory, Pet. Br. at 21 n.7, 30-46, is not only contradicted by precedent, but is logically flawed. In the first instance there is simply no violation to be continued. Rather, the violation will "occur," for purposes of § 706(e), if at all, only when the requisite level or quantum of conduct occurs. As to the second, the plaintiff's reasonable inability to understand that an act is discrimination, calls for equitable tolling of § 706(e), which begins to run at the time the act is complete.

Finally, Petitioner proposes that this Court abandon the text and structure of the Act and its own established precedent to adopt analytically flawed and confusing opinions of other courts of appeals. Pet. Br. at 9-10, 38-46. This invitation should be declined. Petitioner holds up a Seventh Circuit opinion, *Galloway v. General Motors Service Parts Operations*, 78 F.3d 1164 (7th Cir. 1996), with great enthusiasm, and the Fifth Circuit opinion, *Berry v. Board of Supervisors*, 715 F.2d 971 (5th Cir. 1983), with decidedly less fervor. Pet. Br. at 9-10.

Petitioner's choice of *Galloway* as a model for this Court is curious. First, the opinion in this *pro se* appeal affirmed dismissal — after a discussion of the court's views on the relative sex- or gender-relatedness and offensive character of a series of obscenities and vulgarities — on the ground that, on its view of the facts "no inference could be drawn by a reasonable trier of fact that [the alleged harasser's] conduct . . . created a working environment in which [plaintiff] could rationally have considered herself at a disadvantage in relation to her male co-workers by virtue of being a woman." *Galloway*, 78 F.3d at 1168. Thus, such discussion of the continuing violation doctrine as appears in the opinion is *dicta*.

Second, the court's opinion shows that it ignored precedent and statutory language in favor of an untethered, ad hoc approach. It found the continuing violation doctrine "vexing," *id.* at 1165, concluded, on the basis of a hypothetical question, that it gave "too little weight to the social interest in prompt filing," referred to "standard principles of limitations law," and formulated a "concept of *cumulation*," *id.* at 1166 (emphasis in original), that led it to conclude: "It seems to us that in such a case, while she can still sue provided that the last act of harassment occurred within the statute of limitations, she cannot reach back and base her suit also on conduct that occurred outside the statute

of limitations; for she had no excuse for waiting that long." To this was added the "additional consideration[s]" that "the bringing of the suit is almost certain to stop the harassment" and "she can always seek injunctive relief against a continuation of the unlawful conduct." *Id.* at 1167. The court concluded, as follows:

> The principle that we extract from this discussion and that we think organizes the complex and diffuse case law on continuing violations under Title VII is that the plaintiff may not base her (in some cases his) suit on conduct that occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in the light of events that occurred later, within the period of the statute of limitations.

Id. (citations omitted).

In this manner, the *Galloway* court formulated its own rule, without discussion of, or reference to, either the language of the statute or this Court's opinions. The court thus ignored the express accrual rule of § 706(e) in favor of an indefinite "notice accrual" rule of its own making. Moreover, it failed to follow consistent precedent that, where unlawful conduct continues into the charge-filing period, the discrimination "occurs" with the last asserted act in the pattern. *Galloway* is not a correct statement of the law, and cannot serve as a model.[4]

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4. The First Circuit opinion in *Sabree v. United Bhd. of Carpenters and Joiners, Local 33*, 921 F.2d 396 (1st Cir. 1990), likewise creates from whole cloth an "inquiry notice" rule that represents a bar to continuing violations that has no basis in § 706(e) or this Court's cases. Indeed, as Petitioner's brief makes clear, the First Circuit considers no factors other than notice.

Ironically, that *Galloway* is inadequate and aberrational is best illustrated by other opinions of the author of *Galloway*. In *Taylor v. Meirick*, 712 F.2d 1112 (7th Cir. 1983) (Posner, J.), the Seventh Circuit stated "the general principle that the statute of limitations does not begin to run on a continuing wrong till the wrong is over and done," and explained this principle thus:

> The principle strikes a balance between the plaintiff's interest in being spared having to bring successive suits, and the two distinct interests that statutes of limitations serve. One is evidentiary — to reduce the error rate in legal proceedings by barring litigation over claims relating to the distant past. The other is repose. . . . When the final act of an unlawful course of conduct occurs within the statutory period, these purposes are adequately served, in balance with the plaintiff's interest in not having to bring successive suits, by *requiring the plaintiff to sue within the statutory period but letting him reach back and get damages for the entire duration of the alleged violation*. Some of the evidence, at least, will be fresh. And the defendant's uncertainty as to whether he will be sued at all will be confined to the statutory period. His uncertainty about the extent of his liability may be greater, but that is often true in litigation.

Taylor v. Meirick, 712 F.2d 1112, 1116-17, 1118-19 (7th Cir. 1983) (Posner, J.) (emphasis added); *see Heard v. Sheahan*, 253 F.3d 316, 319 (7th Cir. 2001) (Posner, J.) (holding, in the context of a prisoner's 42 U.S.C. § 1983 claim, that "all the pain after the date of onset, as it were, of deliberate indifference [by the defendant] was fair game for the plaintiff's suit, by virtue of the doctrine of 'continuing violation'. . . .").

The Fifth Circuit's *Berry* opinion acknowledges an uncertainty as to proper application of the continuing violation doctrine, but discusses the principles and cases. To the extent that Petitioner implies that *Berry* creates a "notice" rule barring continuing violations, it misreads the case. The three factors in *Berry* do not set up a preclusive notice rule, but are intended to provide some guidance in "determining when alleged discriminatory acts are *related closely enough* to constitute a continuing violation and when they are *merely discrete, isolated acts* which must be regarded as individual violations." *Id.* 715 F.2d at 981 (emphasis added). Thus, as in *Evans, Ricks* and *Lorance,* the inquiry focuses on the particular allegation of a discriminatory act, rather than creating a notice bar. Thus, in asking whether "the act ha[s] the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights," the court is trying to identify when the discrimination "occurs" and is complete, as in the denial of tenure in *Ricks*. And in considering permanence "which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate," the court is merely trying to distinguish between completed discriminatory acts, the mere effects of which will be felt in the future (as in *Evans* and *Lorance*), and intentionally discriminatory acts that may be repeated in the future (as in *Bazemore* and *Havens*). Although *Berry*'s factors attempt to distinguish between completed acts and those that give effect to continuing intentional discrimination, its language has been misread to imply a "notice" bar. For this reason, *Berry* is not an effective statement of the proper rule, as are the cases from the Second, Third, and Ninth Circuits, above.

The United States takes a different approach. It attempts to argue that *Havens* and *Bazemore* stand for the proposition "that a Title VII plaintiff may recover for discrimination that

occurs within the charge-filing period *despite having notice* of a violation outside the period, but may not recover for violations that occurred outside the period." U.S. Br. at 17-19. But even its own discussion of the cases cannot conceal that discriminatory patterns of conduct outside of the limitations period were held to be actionable, and that the determining factor was not notice, but the existence of a "*present violation*" that continued that discriminatory pattern of conduct. U.S. Br. at 17, *quoting Bazemore* at 396 n.6. Indeed, its brief acknowledges that in *Havens*, "the plaintiffs could sue because they had alleged 'an unlawful practice that continue[d] into the limitations period,' " U.S. Br. at 18 (*quoting Havens* at 381), and adds that in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 912 & n.5 (1989), the Court noted that facially discriminatory seniority systems "can be challenged at any time" and that under the Civil Rights Act of 1991, 42 U.S.C. § 2000e-5(e)(2), Congress provided that the subsequent operation of facially neutral but intentionally discriminatory seniority systems could be challenged. U.S. Br. at 17-18 & n.6.

Indeed, the government's brief itself confirms that Congress intended the accrual rule for continuing violations that this Court has followed. The brief quotes from the legislative history of the 1972 amendments to the Act, to the effect that where there are continuing violations, "measuring the running of the time period from the last occurrence of the discrimination and not from the first occurrence is continued." U.S. Br. at 16 *quoting* 118 Cong. Rec. at 4940, 4941. Even as Congress then confirmed the "last occurrence" accrual rule for conduct predating the charge-filing period, it also provided for the accrual of back pay for up to two years prior to the charge-filing period, in § 706(g)(1) of the Act. Yet the United States argues, in contradiction to the obvious intent and effect of the 1972 back pay amendments, without any textual or structural support in the Act, and contrary to established case law, that conduct outside the statute is not actionable.

Thus, the United States agrees with Petitioner that this question should be decided not with reference to the language and interpretations of Title VII, but according to decisions regarding the Clayton Act and civil RICO. Yet the operative limitations of those statutes differ from Title VII and the terms of those statutes provide for recoveries spanning remarkable periods of time. For example, in determining limitations questions regarding civil RICO, the Court has been mindful of the fact that the statute's definition of "pattern" may well permit proof of acts 14 years before a lawsuit is filed. *See Rotella v. Wood*, 528 U.S. 549, 555 (2000). And the recovery permitted by the applicable statute of limitations for the continuing violation in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), included injuries sustained between 1939 and 1955. *Id.* at 484, 495, 502 n.15. Finally, this Court has been concerned that the peculiar availability of treble damages in these statutes would pose a great temptation for plaintiffs deliberately and unfairly to delay in filing suit in order to profit from the accumulation of treble damages. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 187 (1997). Petitioner's deletion of the word "treble" from its quotation of *Klehr* is plainly not an attempt to save space. *See* Pet. Br. at 47 (excising the word "treble" to produce a sentence condemning plaintiffs who delay suit "as the pattern continues and * * * damages accumulate"). As Petitioner is keenly aware, these statutes are anything but analogous to Title VII, with its 180- or 300-day charge-filing period, a two-year limit on back-pay awards, and damages capped at anywhere from $50,000 to $300,000 (depending on the size of the employer).

As well, although Petitioner and the United States correctly note that Title VII's remedial provisions are, at least in part, modeled on the National Labor Relations Act, those parallel provisions need not and should not *ipso facto* be construed in identical ways — because their underlying purposes differ greatly. *See Chauffeurs, Teamsters & Helpers,*

Local No. 391 v. Terry, 494 U.S. 558, 573 (1990) (rejecting the argument that "if Title VII is comparable to one labor law remedy it is comparable to all remedies available in the NLRA context"); *see also Hammontree v. N.L.R.B.*, 925 F.2d 1486, 1498 (D.C. Cir. 1991) (citing "broad[] conceptual differences between the remedial regimes created by Title VII and the NLRA"). Title VII's broad remedial and prophylactic purposes, *see infra* Part III, are not necessarily served by the same doctrines that help secure present and future "industrial peace" under the NLRA, *e.g., Auciello Iron Works, Inc. v. N.L.R.B.*, 517 U.S. 781, 785 (1996). Nevertheless, the NLRA recognizes continuing violations, *see Melville Confections, Inc. v. N.L.R.B.*, 327 F.2d 689, 692 (7th Cir. 1964), and interpretations of the availability of relief under that statute are irrelevant, because it has no express provisions governing the extent of relief permitted and does not afford all of the relief that Title VII does in § 706(g)(1) and 42 U.S.C. § 1981a.

Moreover, the position of the United States in this brief is of recent origin, and contradicts the formal, established interpretations of the federal agency charged with the responsibility to interpret and enforce Title VII.[5]

C. The EEOC's Own Rule, To Which This Court Owes "Great Deference," Is Identical to the Rule Applied By the Court of Appeals.

The court of appeals applied the same rule that the EEOC has adopted in its official interpretation of Title VII. As this Court has noted in upholding EEOC interpretations of Title VII, "[t]he administrative interpretation of the Act by the enforcing agency is entitled to great deference." *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *accord, e.g.,*

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5. *See* Brief of the NAACP Legal Defense and Educational Fund, Inc. as *Amicus Curiae* in Support of Respondent.

Gregory v. Ashcroft, 501 U.S. 452, 493 (1991). The EEOC compliance manual explains "continuing violations" as follows:

> In contrast to a charge which involves an event that transpired on a certain date, a continuing violation takes place over a period of time, including into the filing period. Where a charge raises a continuing violation, *all of the events forming part of the continuing violation, including those that transpired outside the filing period, are considered timely*, and *relief may be obtained for all of the discriminatory events*.

EEOC Compliance Manual § 2-IV.C.2 (EEOC Directives Transmittal, Aug. 21, 2001, at 40) (emphasis added). This directive follows the recent EEOC opinion in *Anisman v. O'Neill*, 2001 WL 402493 (E.E.O.C. Apr. 12, 2001), where the Commission explained its rationale:

> [E]vidence that a complainant had, or should have had, a reasonable suspicion of discrimination more than 45 days prior to initiating EEO Counselor contact, will not preclude acceptance of an otherwise timely claim of ongoing discrimination. This holding is directly related to one of the major goals of the revised 29 C.F.R. Part 1614 regulations, that is, to address the problem of fragmentation of unlawful employment practice claims. . . .
>
> When a continuing violation is alleged, *the running of the period for initiating a Title VII complaint starts from the most recent occurrence of the alleged discrimination* and not from the first occurrence.

Id. at *4-5 (emphasis added).

The EEOC, which as the enforcing agency for Title VII is thoroughly familiar with the day-to-day operation of the statute, has adopted a definition for continuing violations of Title VII consistent with the language, structure, and legislative intent of the statute and with this Court's precedent. Certainly the EEOC has every incentive to craft rules that reduce litigation and increase voluntary employer compliance, while ensuring that cases are prosecuted in a timely manner. This Court should defer to the considered, consistent judgment of this statutory agency.

II. TITLE VII'S EXPLICIT PROVISIONS AFFORDING RELIEF SHOULD NOT BE UNDERCUT BY AN IMPLIED LIMITATION BASED ON THE CHARGE-FILING PROVISION.

Congress has affirmatively provided a sophisticated remedial scheme that specifies when and by what means various remedies are available under Title VII. These remedial provisions make no reference to the charge-filing period as a limitation on remedies; likewise, the charge-filing provision speaks only to filing and says nothing about remedies ("A charge under this section shall be filed within [either 180 or 300] days after the alleged unlawful employment practice occurred. . . ."). Thus, both the structure and language of the sections of the Act that afford remedies preclude the use of the charge-filing period as a judicial limitation on remedies. Section 706(g)(1) of the Act, with its two-year limit on back pay awards, clearly provides relief for acts outside the 180- or 300-day charge-filing period — and thus is evidence that Congress has endorsed the existing continuing violation doctrine. Section 1981a's graduated schedule of caps on compensatory and punitive damages contains Congress's affirmative and express judgment with respect to the issue of limits on Title VII damage awards. This Court must honor Congress's judgments on these matters and cannot accept the invitation of Petitioner and the United States to imply an inconsistent additional limit from the charge-filing provision in § 706(e) of the Act.

A. By Its Plain Terms, Section 706(g)(1) Provides For the Award of Monetary Relief Covering A Period Longer Than the Statutory Filing Period.

Section 706(g)(1) provides that "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission." 42 U.S.C. § 2000e-5(g)(1). And since back pay can "accrue" only if it is caused by a violation, it follows from the language of § 706(g)(1) that a plaintiff can seek to establish employer liability for actions outside the statutory period. That is, it expressly provides relief pursuant to the continuing violation doctrine as it exists in *Evans, Ricks, Havens, Bazemore, and Lorance*, and as articulated by the EEOC, *see* EEOC Compliance Manual, *supra*, § 2-IV.C.2 ("Where a charge raises a continuing violation, . . . relief may be obtained for all of the discriminatory events," "including those that transpired outside the filing period").

Not only does § 706(g)(1) explicitly contemplate relief outside the filing period, but the express language of that section strongly suggests that this two-year limit on back pay is the *only* limit on relief awarded under that section. Various equitable remedies are permitted, yet the only mention of any limit on any of these forms of relief is the above-quoted two-year limit on backpay:

> If the court finds that the respondent has intentionally engaged or is intentionally engaging in an unlawful employment practice . . . , the court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief

> as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.

The clear effect of this language is that if a court "deems appropriate," any "equitable relief" except backpay *may* reach back beyond two years of the filing date. And in either event, the charge-filing period does not itself operate an independent limitation.

This Court's cases confirm that § 706(e)(1) does not limit the relief that may be awarded under § 706(g)(1). In *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 758 (1976), this Court rejected a similar request to import a limit into § 706(g)(1) from another section of the Act (§ 703(h), 42 U.S.C. § 2000e-2(h)). The Court observed that "[s]ection 703(h) certainly does not expressly purport to qualify or proscribe relief otherwise appropriate under the remedial provisions of Title VII, § 706." So it is here; § 706(e) plainly speaks to when a charge must be filed, not to how far back appropriate relief may be granted. Similarly, just a few months ago this Court unanimously rejected an attempt to import damage caps as a limit on § 706(g)(1) remedies. *See Pollard v. E.I. Du Pont De Nemours & Co.*, 121 S. Ct. 1946 (2001). And in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Court referred to the two-year limit on back pay as the sole, determinative temporal limit on such relief. *See id.* at 410 n.3 ("Under Title VII backpay liability exists only for practices occurring after the effective date of the Act, July 2, 1965, and accrues only from a date two years prior to the filing of a charge with the EEOC.").

B. In Providing For Compensatory and Punitive Damages Under Title VII, Congress Chose a Detailed Schedule of Limitations Drastically Different From The Charge-Filing Period.

In the 1991 amendments to Title VII, Congress placed a sophisticated set of caps on the dollar amounts recoverable for compensatory and punitive damages, calibrated to the size of the employer:

> The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party —
>
> (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;
>
> (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and
>
> (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and
>
> (D) in the case of a respondent who has more than 500 employees in each of 20

or more calendar weeks in the current or preceding calendar year, $300,000.

42 U.S.C. § 1981a(b)(3). This legislative decision shows that Congress has determined the issue of the availability and limits on Title VII damage awards, without any reference to the charge-filing period. This Court may not create a different standard. Even if this Court were to agree with the policy judgments offered by Petitioner and the United States, this Court may not imply additional limits by adopting a contradictory construction of the remedial scheme.

When the United States observes that "[d]ollar limits on damages are compatible with temporal limits on recovery," U.S. Br. at 25, it is stating only that it is logically possible to impose a different, additional limit on Title VII awards — a cutoff based on the charge-filing provision (a section of the statute that makes no reference to relief), in addition to the more expansive two-year limit on back pay and the entirely different damage cap scheme decided upon by Congress. It may well be possible to add another limit, but that does not make it this Court's prerogative to do so.

III. THE EXISTING CONTINUING VIOLATION DOCTRINE COMPORTS WITH LEGISLATIVE INTENT, FOSTERS JUDICIAL ECONOMY, AND PROMOTES EQUITY.

A. The Established Continuing Violation Doctrine Endorsed and Facilitated by Congress Serves the Purposes of Title VII.

As this Court has noted, its decisions in this area must "be measured against the purposes which inform Title VII." The Court has sought to enunciate rules "which, if applied generally" in Title VII cases, "would not frustrate the central statutory purposes of [1.] eradicating discrimination

throughout the economy and [2.] making persons whole for injuries suffered through past discrimination." This Court has required "principled application of standards consistent with" these two "transcendent legislative purposes." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (quoting *Griggs v. Duke Power Co.*, 401 U.S. at 429-30). Here, the established continuing violation doctrine is the only rule that comports with these directives.

The primary, "prophylactic" purpose of Title VII is served by the preservation of incentives for employers to eradicate discrimination. If an employer knows it may be liable for *any* continuing course of discrimination, it will have strong incentives to end such treatment. Only such a rule serves Title VII's aim to "motivate employers to detect and deter Title VII violations." *Kolstad v. American Dental Ass'n*, 119 U.S. 2118, 2121 (1999). Further, repose is served, once continuing discrimination has stopped or after a discrete, non-continuing violation.

A contrary rule linking the continuing violation doctrine to "notice" would place enormous litigation burdens on employees by virtually assuring employers that they can never be held liable for more than 300 continuous days of intentional discrimination in a single lawsuit. It would also place the onus on the employee to divine the precise moment when a court will find that there is enough discrimination to bring suit, but not so much discrimination that damages for some of the discrimination are already out of reach because of "notice". Placing these burdens on employees would contravene the Court's teaching that underlying Title VII is a basic policy of "encouraging forethought by employers and saving action by objecting employees." *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998); *see also id.* at 764 ("Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms."); *cf.* 29 C.F.R. § 1604.11(f) (1997) (encouraging

employers to develop grievance procedures and to "take all steps necessary to prevent sexual harassment from occurring").

The United States argues that if the charge-filing period were construed as a remedial limit (notwithstanding the express language of the statute to the contrary), employers would "always have an incentive to comply with Title VII, because their ongoing violations remain actionable." U.S. Br. at 9. It states this as though it is somehow remarkable that its reading of Title VII preserves the viability of claims based on *present* discrimination. Congress did not enact or intend such a crabbed rule. This Court has stated, in the related context of awards of backpay under Title VII, "[i]t is the reasonably certain prospect of a backpay award that *provides the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices* and to endeavor to eliminate" discrimination. *Albemarle*, 422 U.S. at 417-18 (emphasis added). Similar logic applies here. The established continuing violation doctrine is crucial to providing "the spur or catalyst" for employers "to self-examine."[6] In the same spirit, this Court has taught that "[w]here racial discrimination is concerned, [a] district court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

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6. Such incentives for self-examination reinforce and complement the broad affirmative duties Title VII imposes on employers to avoid or prevent violations of Title VII. *See Faragher*, 524 U.S. at 806. Courts have not hesitated to find that where employers take modest affirmative measures they can predictably protect themselves from Title VII liability. *See, e.g., Scrivner v. Socorro Indep. Sch Dist.*, 169 F.3d 969, 971-72 (5th Cir. 1999) (employer not liable because it had an effective anti-harassment policy and responded promptly to complaints); *Stuart v. General Motors Corp.*, 217 F.3d 621 (8th Cir. 2000) (employer's response to complaints relieved employer of liability).

There is no tradeoff here between prompt filing and incentives for employers to eliminate unlawful discrimination. As noted, there is no incentive to postpone suit because there are no treble damages. Moreover, this Court has stated that in order for the continuing violation doctrine to apply there must be a "continu[ation]" of the same "act or practice," *Bazemore*, 478 U.S. at 395, a requirement which adequately protects against attempts to revive discrete, unrelated, time-barred acts. And employees already are required to put their employers on notice of their *Faragher* complaints. *See supra* n.6.

In any event, under this Court's teachings, continuing violations are by definition not stale. Thus, this case is not about weighing repose against other possible ends to be served; rather, it is about determining whether there is any staleness concern at all. "Where the challenged violation is a continuing one, the staleness concern disappears." *Havens*, 455 U.S. at 380.

B. Grafting A "Notice" Limitation Onto Section 706(e) Would Encourage Multiple, Premature Lawsuits.

A "notice accrual" rule for Title VII suits would put a premium on precipitous and duplicative litigation, sending a message to employees that, essentially, sooner is usually safer. It would threaten to penalize, and thereby would push toward federal courthouses, others who, like Mr. Morgan, might otherwise attempt less drastic measures to resolve disputes and to give employers opportunities to correct violations outside the legal process.

Furthermore, under a rule that measures accrual at each day of violation, "make whole" relief would require multiple lawsuits instead of a single lawsuit for a related series of acts or continuing course of action. Potentially, every day is another cause of action. As noted in the context of § 1983 claims, "[w]e have enough prisoners' suits without having to create incentives to bring multiple suits arising out of the same course of events." *Heard*, 253 F.3d at 320.

Mr. Morgan's case provides an example of these problems and the unfairness that a notice accrual rule limitation would create. With regard to each incident of discrimination, he diligently sought means of resolving the problem short of a federal lawsuit. It is frankly appalling to have Amtrak disingenuously assert — without any regard to the history of Mr. Morgan's persistent appeals to Amtrak to address the discrimination of Messrs. Vandenburg, Denton, Bordenave, Borge, Geske, and others — that Mr. Morgan has somehow "knowingly [sat] on his . . . rights". Pet. Br. at 46. And it would be far too generous to suggest that Amtrak was merely "sitting." Despite persistent pleas for redress, Amtrak knowingly permitted its managers to pursue their pattern of discrimination against Mr. Morgan. It would thwart the purposes of Title VII to allow the very notice that should have spurred Amtrak to action to be used against Mr. Morgan.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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